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Kerk Han Ming v Lee Yu Meng & Ors

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-547–10 OF 2023
ATAN MUSTAFFA J
30 OCTOBER 2024

C *Civil Procedure — Affidavits — Cross-examination of deponent to affidavit — Minority shareholder filed oppression action via originating summons — Applicant as newly appointed director of company filed application to cross examine deponents in oppression action — Whether applicant had identified relevant disputed facts — Whether applicant had demonstrated relevance of*
D *cross-examination to issues to be decided — Whether applicant had shown that existing affidavit evidence was insufficient to resolve disputes — Whether there was delay in filing application — Whether benefits of cross-examination outweighed any potential delay in proceedings — Companies Act 2016 — Rules of Court 2012 O 28 & O 38 r 2*

E

Kerk Han Meng ('Kerk') and Sim Chin Hu ('Sim') were the original shareholders of CJ Polymers Sdn Bhd ('CJ Polymers') before both of them transferred some of their shares to Lee Yu Meng ('Lee'). Via OS 138, Sim had filed oppression action against CJ Polymers, Kerk and Lee and this action
F ended with the court found in favour of Sim. Subsequently, Lee had passed a circular resolution declaring that Kerk had vacated his office as director of CJ Polymers and on the same day, Wong Kok Kheong ('Wong') was appointed as a director of CJ Polymers. CJ Polymers then allotted 26,000,000 shares to Wong. Aggrieved, Kerk filed an oppression action under the Companies Act
G 2016 via the present originating summons ('the OS') challenging three specific corporate actions: his removal as director, Wong's appointment as director, and the allotment of shares to Wong. In response, Wong filed encl 176 seeking orders for cross-examination of deponents in the OS proceedings in relation to three main issues: whether the company operated as a quasi-partnership, the
H circumstances leading to the shareholder's removal as director, and allegations of financial misconduct. The application was made pursuant to O 28 and O 38 r 2 of the Rules of Court 2012. It ought to be noted that CJ Polymers had also filed an action against Kerk and Sim via Suit 786. The issues that arose in encl 176 were: (a) whether Wong had sufficiently identified relevant disputed
I facts that warranted cross-examination and were relevant to the core issues in the present case; (b) whether Wong had adequately explained how cross-examination was relevant to the issues to be decided in the present case; (c) whether the existing affidavit evidence (11 affidavits with 82 exhibits) was sufficient for the court to decide the case without cross-examination;

(d) whether the alleged disputed facts relating to other court cases (OS 138 and Suit 786) were relevant to the current proceedings; (e) whether there was inordinate delay in filing the application for cross-examination, given that the proceedings were nearing conclusion; and (f) whether allowing cross-examination at this stage would unnecessarily delay the disposal of the case.

Held, allowing encl 176 with costs in the cause:

(1) The question of quasi-partnership, the lawfulness of directorial appointments and share allotments, and the allegations of financial impropriety were all crucial elements that required thorough examination. Given the complexity and importance of these issues, the court found that they could not be satisfactorily resolved on affidavit evidence alone. Cross-examination was necessary to fully explore these disputed facts and to allow for a proper assessment of the credibility of the parties' conflicting accounts. For these reasons, the court was satisfied that Wong had sufficiently identified relevant disputed facts that warranted cross-examination and were relevant to the core issues in the present case (see paras 69–70).

(2) The court found that Wong had adequately explained how cross-examination was relevant to the issues to be decided. The disputed facts identified went to the heart of the oppression claim and could not be satisfactorily resolved on affidavit evidence alone. Cross-examination would provide a crucial opportunity to test the evidence and assess the credibility of the witnesses on these key issues, thereby assisting the court in making a fair and informed decision on the oppression claim (see para 92).

(3) While the 11 affidavits with 82 exhibits provided a substantial evidentiary foundation, they were not sufficient to resolve the key factual disputes in the present case. The complex nature of the allegations, the conflicting accounts of crucial events, and the need to assess the credibility of the parties on central issues all pointed to the necessity of cross-examination. This would enable the court to make a more informed and just determination of the oppression claim, based not only on documentary evidence but also on the demeanour and credibility of the witnesses when subjected to questioning on their evidence (see para 108).

(4) While the court must be cautious not to encroach on matters properly before other courts, the findings from OS 138 regarding the quasi-partnership status and the allegations of misconduct in Suit 786 were sufficiently relevant to the current oppression claim to warrant consideration. The court must strike a balance between avoiding the re-litigation of decided matters and ensuring that all relevant

information was considered in the current proceedings. This approach allowed for a nuanced and contextual understanding of the dispute, which was essential in oppression cases where the relationship between parties and the overall conduct of the company's affairs were central to the determination of the claim. Cross-examination on these issues would assist the court in determining their proper weight and relevance to the oppression claim, ensuring a comprehensive and just assessment of the dispute before the court (see para 126).

(5) While the application for cross-examination was not made immediately after the initial exchange of affidavits, the court did not find that there had been inordinate delay in the circumstances of the present case. The application was made at a stage where the full scope of factual disputes had become apparent, but before the proceedings had reached a concluding phase. The interests of justice and the need for a full exploration of the issues in this complex oppression claim outweighed any concerns about the timing of the application (see para 138).

(6) While allowing cross-examination would inevitably cause some delay in the proceedings, the court found that this delay was neither unnecessary nor disproportionate given the circumstances of the present case. The complexity of the issues, the seriousness of the allegations, and the central importance of the disputed facts to the oppression claim all justified the additional time that cross-examination would require. The opportunity to test the evidence through cross-examination would significantly aid the court in making a fair and informed decision on the complex issues raised in this oppression claim. The factual disputes identified went to the heart of the case and involved allegations of bad faith and misconduct that could not be adequately resolved through affidavit evidence alone. The potential for cross-examination to assist in achieving a just and properly informed resolution of the dispute outweighed the concerns about delay. Therefore, the court found that the benefits of allowing cross-examination outweighed the potential negative impacts of delay in the present case, and the court did not consider that allowing cross-examination at this stage would unnecessarily delay the disposal of the case (see para 161).

(7) For the above reasons, the court was satisfied that Wong had met the criteria for allowing cross-examination as set out in *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638. He had identified relevant disputed facts, demonstrated the relevance of cross-examination to the issues to be decided, and shown that the existing affidavit evidence was insufficient to resolve these disputes. The application was not filed with undue delay, and the benefits of cross-examination outweighed any potential delay in the proceedings (see para 162).

[Bahasa Malaysia summary

Kerk Han Meng ('Kerk') dan Sim Chin Hu ('Sim') adalah pemegang-pemegang saham asal CJ Polymers Sdn Bhd ('CJ Polymers') sebelum kedua-duanya memindahkan sebahagian saham mereka kepada Lee Yu Meng ('Lee'). Melalui OS 138, Sim telah memfailkan tindakan penindasan terhadap CJ Polymers, Kerk dan Lee dan tindakan ini berakhir dengan keputusan mahkamah yang memihak kepada Sim. Selepas itu, Lee telah meluluskan resolusi pekeliling yang mengisytiharkan bahawa Kerk telah mengosongkan pejabatnya sebagai pengarah CJ Polymers dan pada hari yang sama, Wong Kok Kheong ('Wong') telah dilantik sebagai pengarah CJ Polymers. CJ Polymers kemudian memperuntukkan 26,000,000 saham kepada Wong. Kerana terkilan, Kerk memfailkan tindakan penindasan di bawah Akta Syarikat 2016 melalui saman pemula semasa ('SP tersebut') bagi mencabar tiga tindakan korporat yang khusus iaitu: penyingkirannya sebagai pengarah, pelantikan Wong sebagai pengarah, dan pembahagian saham kepada Wong. Sebagai tindak balas, Wong memfailkan lampiran 176 bagi memohon perintah untuk pemeriksaan balas deponen-deponen dalam prosiding SP tersebut berhubung dengan tiga isu utama: sama ada syarikat tersebut beroperasi sebagai perkongsian separa, keadaan yang membawa kepada penyingkiran pemegang saham tersebut sebagai pengarah, dan dakwaan salah laku kewangan. Permohonan tersebut dibuat menurut A 28 dan A 38 k 2 Kaedah-Kaedah Mahkamah 2012. Perlu diambil perhatian bahawa CJ Polymers juga telah memfailkan tindakan terhadap Kerk dan Sim melalui Saman 786. Isu-isu yang timbul dalam lampiran 176 ialah: (a) sama ada Wong telah mengenal pasti dengan secukupnya fakta-fakta yang dipertikaikan yang relevan bagi mewajarkan pemeriksaan balas dan fakta tersebut adalah relevan kepada isu utama dalam kes semasa; (b) sama ada Wong telah menjelaskan dengan secukupnya bagaimana pemeriksaan balas adalah berkaitan dengan isu-isu yang akan diputuskan dalam kes semasa; (c) sama ada keterangan afidavit sedia ada (11 afidavit dengan 82 ekshibit) mencukupi untuk mahkamah memutuskan kes tanpa pemeriksaan balas; (d) sama ada fakta yang dikatakan dipertikaikan yang berkaitan dengan kes-kes mahkamah yang lain (OS 138 dan Saman 786) adalah berkaitan dengan prosiding semasa; (e) sama ada terdapat kelewatan yang melampau dalam memfailkan permohonan untuk pemeriksaan balas, memandangkan prosiding tersebut hampir tamat; dan (f) sama ada membenarkan pemeriksaan balas pada peringkat ini akan melambatkan pelupusan kes tersebut.

Diputuskan, membenarkan lampiran 176 dengan kos di dalam kausa:

(1) Persoalan tentang perkongsian separa, keabsahan pelantikan pengarah dan peruntukan saham, dan dakwaan salah laku kewangan adalah semua elemen penting yang memerlukan pemeriksaan menyeluruh. Memandangkan kerumitan dan kepentingan isu-isu ini, mahkamah mendapati bahawa ia tidak dapat diselesaikan dengan memuaskan hanya

melalui keterangan afidavit sahaja. Pemeriksaan balas adalah perlu untuk meneroka sepenuhnya fakta yang dipertikaikan ini dan untuk membolehkan penilaian yang betul ke atas kredibiliti kes pihak-pihak yang bercanggah. Atas sebab-sebab ini, mahkamah berpuas hati bahawa Wong telah mengenal pasti dengan secukupnya fakta-fakta yang dipertikaikan yang relevan yang memerlukan pemeriksaan balas dan yang relevan dengan isu-isu teras dalam kes semasa (lihat perenggan 69–70).

(2) Mahkamah mendapati Wong telah menjelaskan dengan secukupnya bagaimana pemeriksaan balas adalah relevan dengan isu-isu yang akan diputuskan. Fakta yang dipertikaikan yang telah dikenal pasti menjadi intipati tuntutan penindasan dan tidak dapat diselesaikan dengan memuaskan hanya berdasarkan keterangan afidavit sahaja. Pemeriksaan balas akan memberi peluang penting untuk menguji keterangan tersebut dan menilai kredibiliti saksi-saksi mengenai isu-isu utama ini, dengan itu membantu mahkamah membuat keputusan yang adil dan termaklum mengenai tuntutan penindasan tersebut (lihat perenggan 92).

(3) Walaupun 11 afidavit dengan 82 eksibit tersebut menyediakan asas pembuktian yang besar, ia tidak mencukupi untuk menyelesaikan pertikaian fakta utama dalam kes semasa. Sifat kompleks dakwaan-dakwaan tersebut, akaun yang bercanggah tentang peristiwa penting, dan keperluan untuk menilai kredibiliti pihak-pihak mengenai isu-isu utama semuanya menunjukkan keperluan pemeriksaan balas. Ini akan membolehkan mahkamah membuat penentuan yang lebih termaklum dan adil bagi tuntutan penindasan tersebut, bukan sahaja berdasarkan keterangan dokumentar tetapi juga berdasarkan gelagat dan kredibiliti saksi-saksi apabila disoal mengenai keterangan mereka (lihat perenggan 108).

(4) Walaupun mahkamah haruslah berhati-hati untuk tidak campur tangan dengan perkara-perkara yang sewajarnya di hadapan mahkamah yang lain, dapatan-dapatan daripada OS 138 mengenai status perkongsian separa dan dakwaan salah laku dalam Saman 786 adalah cukup relevan dengan tuntutan penindasan semasa yang memerlukan pertimbangan. Mahkamah haruslah menyeimbangkan antara mengelakkan litigasi semula perkara-perkara yang telah pun diputuskan dan memastikan semua maklumat yang berkaitan dipertimbangkan dalam prosiding semasa. Pendekatan ini membolehkan pemahaman yang bernuansa dan kontekstual tentang permasalahan yang timbul, yang mana ini penting dalam kes penindasan di mana hubungan antara pihak-pihak dan keseluruhan pengendalian hal ehwal syarikat adalah menjadi keutamaan bagi penentuan tuntutan. Pemeriksaan balas terhadap isu-isu ini akan membantu mahkamah dalam menentukan nilainya yang wajar dan kaitannya dengan tuntutan penindasan tersebut, memastikan penilaian

yang komprehensif dan adil terhadap pertikaian di hadapan mahkamah (lihat perenggan 126).

(5) Walaupun permohonan untuk pemeriksaan balas tidak dibuat serta-merta selepas pertukaran afidavit-afidavit di peringkat awal, mahkamah tidak mendapati bahawa terdapat kelewatan yang melampau dalam keadaan kes semasa. Permohonan tersebut dibuat pada peringkat di mana skop penuh pertikaian fakta telah menjadi jelas, tetapi sebelum prosiding mencapai fasa penutup. Kepentingan keadilan dan keperluan untuk penerokaan penuh isu-isu dalam tuntutan penindasan yang kompleks ini mengatasi apa-apa kebimbangan mengenai masa permohonan (lihat perenggan 138).

(6) Walaupun membenarkan pemeriksaan balas sudah pasti akan menyebabkan sedikit kelewatan dalam prosiding, mahkamah mendapati bahawa kelewatan ini bukanlah tidak perlu atau tidak berkadar apabila mengambil kira keadaan kes semasa. Kerumitan isu-isu, keseriusan dakwaan-dakwaan, dan kepentingan utama fakta-fakta yang dipertikaikan kepada tuntutan penindasan tersebut semuanya mewajarkan masa tambahan yang diperlukan untuk pemeriksaan balas. Peluang untuk menguji keterangan melalui pemeriksaan balas akan membantu mahkamah membuat keputusan yang adil dan termaklum mengenai isu-isu rumit yang dibangkitkan dalam tuntutan penindasan ini. Pertikaian fakta yang dikenal pasti tersebut menjadi intipati bagi kes tersebut dan melibatkan dakwaan niat jahat dan salah laku yang tidak dapat diselesaikan secukupnya melalui keterangan afidavit sahaja. Potensi untuk pemeriksaan balas membantu dalam mencapai penyelesaian pertikaian yang adil dan termaklum dengan betul mengatasi kebimbangan mengenai kelewatan. Oleh itu, mahkamah mendapati bahawa faedah membenarkan pemeriksaan balas mengatasi potensi kesan negatif kelewatan dalam kes semasa, dan mahkamah tidak menganggap bahawa membenarkan pemeriksaan balas pada peringkat ini akan melambatkan pelupusan kes tanpa keperluan (lihat perenggan 161).

(7) Atas sebab-sebab di atas, mahkamah berpuas hati bahawa Wong telah memenuhi kriteria untuk membenarkan pemeriksaan balas seperti yang dinyatakan dalam *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638. Beliau telah mengenal pasti fakta yang dipertikaikan yang relevan, menunjukkan kerelevanan pemeriksaan balas terhadap isu-isu yang akan diputuskan, dan menunjukkan bahawa keterangan afidavit sedia ada tidak mencukupi untuk menyelesaikan pertikaian ini. Permohonan tersebut tidak difailkan dengan kelewatan yang tidak wajar, dan faedah pemeriksaan balas telah mengatasi apa-apa kemungkinan kelewatan dalam prosiding (lihat perenggan 162).

Cases referred to

Charles Koo Ho-Tung v Koo Lin Shen [2015] MLJU 910; [2016] 2 CLJ 267, HC (refd)

Dato' Dr Henry Ooi Kwee Lim v Majlis Perubatan Malaysia [2012] 1 MLJ 549, HC (refd)

Dato' Tan Wei Lian v Datuk Mansor Masikon [2019] MLJU 1615, HC (refd)

Datuk Kasi a/l KL Palaniappan v Menara Embun Sdn Bhd & Ors and another case [2023] MLJU 2412, HC (refd)

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, HL (refd)

Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors [2006] 4 MLJ 421, HC (refd)

Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd [2001] 4 MLJ 56, CA (refd)

ISM Sdn Bhd v Queensway Nominees (Tempatan) Sdn Bhd [2015] MLJU 757; [2016] 2 CLJ 294, HC (refd)

Kumugai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)

Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd [1980] 1 MLJ 189 (refd)

Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd [1995] 5 MLJ 509; [1999] 3 CLJ 26, HC (refd)

Seah Eng Toh Daniel v Kingsley Khoo Hoi Leng & 3 Ors [2015] MLJU 2353, HC (refd)

Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor and another appeal [2018] 2 MLJ 322, CA (refd)

Tan Hock Beng v Perfect Kamhung Sdn Bhd [2009] 6 MLJ 92, HC (refd)

Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd [2007] 4 MLJ 638, CA (folld)

Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217, SC (refd)

Wong Kie Chie v The Personal Representative Of The Estate Of Wong Kie Nai (deceased) & Ors [2015] MLJU 359, HC (refd)

Legislation referred to

Companies Act 2016 s 346
Evidence Act 1950 ss 101(1), 102
Rules of Court 2012 O 1A, O 28, O 38 rr 2, 2(2)

J Shamesh (with Kumarappan Ramasamy and Suzanne Kurian) (Jeeva Partnership) for the plaintiff.

Alvin Tang (with Kang Zhen Leong) (Alvin Tang Law Office) for the first defendant.

Siew Choon Jern (with Ong Chern Yii) (Douglas Yee) for the second defendant.

S Muhilan (with Samantha Sum Pui Si) (Muhillan, Chan & Gomez) for the third defendant.

K Kirubakaran (with John Wong and Chong Kah Yee) (Shui-Tai) for the fifth defendant.

Atan Mustaffa J:

[1] This judgment concerns an application for leave to cross-examine deponents in an oppression action under the Companies Act 2016. The underlying dispute involves a minority shareholder who claims he was wrongfully removed as director and had his shareholding diluted through a share allotment to a new director. The applicant seeks to cross-examine witnesses on three main issues: whether the company operates as a quasi-partnership, the circumstances leading to the shareholder's removal as director, and allegations of financial misconduct. The application was filed approximately six months after the exchange of the main affidavits and two months before the scheduled hearing date of the oppression action. The respondents oppose the application on grounds that it was filed with undue delay, the disputed facts are not central to the core issues, and there is sufficient documentary evidence for determination. This matter requires the court to consider whether particular circumstances justify departing from the usual practice of determining such applications on affidavit evidence alone.

BACKGROUND FACTS

[2] CJ Polymers Sdn Bhd was incorporated on 16 February 2001. By 27 December 2018, the shareholding structure consisted of the plaintiff, Kerk Han Meng, ('Kerk') and the fourth defendant, Sim Chin Hu, ('Sim') as equal shareholders, each holding 10,000,000 shares. On 12 September 2019, both Kerk and Sim transferred 300,000 shares each to the first defendant, Lee Yu Meng, ('Lee') resulting in Kerk and Sim each holding 48.5% (9,700,000 shares) and Lee holding 3% (600,000 shares).

[3] On 23 December 2021, CJ Polymers allotted 6,000,000 additional shares, with 5,820,000 going to Kerk and 180,000 to Lee. This changed the shareholding structure to: Kerk with 59.7% (15,520,000 shares), Sim with 37.3% (9,700,000 shares), and Lee with 3% (780,000 shares).

[4] In March 2020, Sim filed Kuala Lumpur High Court Originating Summons No WA-24NCC-138–03 of 2020 ('OS 138') against CJ Polymers, Kerk and Lee under s 346 of the Companies Act 2016, claiming oppression based on his alleged legitimate expectation to participate in CJ Polymers' management due to a quasi-partnership with Kerk. Kua Chin Wee, the second defendant, ('Kua') was brought in as a defendant in OS 138 because he was a shareholder who had purchased 1/3 stake in CJ Polymer and was allegedly involved with the Kerk and Lee in oppressing Sim's rights by orchestrating the

transfer of 3% shares to break the 50:50 deadlock, which enabled them to remove Sim from management. The High Court on 9 November 2022 found in Sim's favour, holding that CJ Polymers was formed as a quasi-partnership between Sim and Kerk with an understanding that both would participate in management as long as they remained shareholders, and ordered that Sim's shares be bought out by CJ Polymers and/or alternatively by Kerk, Lee or Kua at fair value to be determined by an independent valuer.

[5] Both Kerk and Lee filed appeals against this decision in Appeal No W-02(NCC)(A)-2148–11 of 2022 ('Appeal 2148'), which was pending and scheduled for hearing on 29 May 2024. Kerk has since filed a notice of discontinuance of his appeal on 20 May 2024.

[6] On 29 August 2023, Lee passed a circular resolution declaring that Kerk had vacated his office as director of CJ Polymers. On the same day, the third defendant, Wong Kok Kheong ('Wong') was appointed as a director. Shortly after, on 6 September 2023, CJ Polymers allotted 26,000,000 shares to Wong at RM0.05 per share, doubling the total issued shares to 52,000,000. This created a new shareholding structure: Wong with 50% (26,000,000 shares), Kerk with 29.85% (15,520,000 shares), Sim with 18.65% (9,700,000 shares), and Lee with 1.5% (780,000 shares).

[7] On 18 September 2023, Kerk was prevented from entering CJ Polymers' office. That same day, CJ Polymers engaged BDO Malaysia for a forensic investigation into certain transactions.

[8] On 29 September 2023, Lee lodged a police report against Kerk and Sim alleging criminal breach of trust involving RM3,169,480.47.

[9] On 5 October 2023, Kerk filed the present originating summons ('OS') challenging three specific corporate actions: his removal as director, Wong's appointment as director, and the allotment of shares to Wong. On 27 October 2023, CJ Polymers filed Kuala Lumpur High Court Civil Suit No WA-22NCC-786–10 of 2023 ('Suit 786') against Kerk and Sim.

[10] On 14 November 2023, Lee lodged another police report against Kerk and Sim alleging criminal breach of trust involving RM4,163,884.30.

[11] In these proceedings, Wong filed an application in encl 176 on 6 June 2024 seeking orders for cross-examination of deponents in the originating summons proceedings. The application was made pursuant to O 28, O 38 r 2 of the Rules of Court 2012. The hearing of the originating summons had been scheduled for 31 July 2024. There is also a pending application to transfer Suit 786 to be heard together with the current proceedings.

ENCLOSURE 176

[12] Wong's notice of application in encl 176 seeks several orders, including: (a) for the OS to be heard in open court, by way of trial or otherwise; (b) for Kerk and/or parties to be subjected to cross-examination on their respective affidavits filed in support of and/or in opposition to encl 1; (c) for parties to be at liberty to lead evidence by way of oral evidence with cross-examination; (d) for parties to have the right to cross-examine the deponents of all affidavits, the makers of all documents exhibited in the affidavits, and the various parties to the OS; and (e) for the notice of intention to cross-examine to be served upon the respective solicitors at least eight days before the trial of the OS.

[13] The grounds for the application, as stated by Wong, are that there are disputed facts which ought to be tested by cross-examination of the respective deponents of their affidavits. These disputed facts relate to several key issues: (a) the alleged unlawful vacation of Kerk's directorship in CJ Polymers; (b) the alleged unlawful allotment and issuance of 26,000,000 shares to Wong at RM0.05 per share; (c) the allegation that Lee and Wong are conducting the affairs of CJ Polymers in a manner oppressive to and/or in disregard of Kerk's interests as a member; and (d) the allegation by Lee, Wong, and CJ Polymers that Kerk and Sim Chin Hu misappropriated CJ Polymers' monies to companies jointly owned by them, which Kerk disputes. Wong contends that these disputed facts cannot be resolved via affidavit evidence alone and must be investigated further through cross-examination.

SUBMISSIONS OF PARTIES

Wong's submissions

[14] Wong submits that there are multiple disputed facts which cannot be resolved by affidavit evidence alone and must be tested by cross-examination of the relevant deponents. He argues that these disputed facts are crucial to the determination of the OS.

[15] Wong contends that the core issues surrounding the case include the legality of how Kerk was removed as CJ Polymers' director and the legality of the manner in which Lee and Wong took over control of CJ Polymers. He asserts that these issues involve substantial disputes of fact that require thorough examination through cross-examination.

[16] Wong argues that there are three main areas of disputed facts that necessitate cross-examination: (a) whether CJ Polymers is a quasi-partnership; (b) Kerk's conduct in relation to the RM5m deposit; and (c) the alleged

misappropriation of CJ Polymers' funds by Kerk and Sim through 'round tripping' involving their privately owned companies.

[17] Wong maintains that the determination of these disputed facts is critical for the disposal of the OS. He contends that if Kerk is found guilty of the alleged misconduct, it would defeat any legitimate expectation to management, even if such expectation existed.

[18] Wong submits that the cross-examination is necessary to properly determine the bona fides of the parties involved. He argues that issues relating to the good faith of the parties cannot be properly determined without cross-examination.

[19] Wong asserts that there is no delay in the filing of the cross-examination application, as the exchange of affidavits for the OS had not been exhausted at the time of filing. He contends that his application was made in good faith and with no intention to delay the disposal of the case.

Lee's submissions

[20] Lee supports the application and submits that because there are multiple disputed facts which cannot be resolved by affidavit evidence and must be tested by cross-examination of the relevant deponents.

[21] Lee contends that the entirety of the OS is premised on the contention that the company is a quasi-partnership. Lee argues that without this additional element of a quasi-partnership, the plaintiff cannot lay claim to any legitimate expectation to management, and his claim of oppression is doomed to fail.

[22] Lee points out that the plaintiff's contentions on affidavit evidence regarding the quasi-partnership issue are confused and uncertain. Lee's counsel highlights the inconsistencies in the plaintiff's positions taken in OS 138, Appeal 2148, and the current OS, arguing that these contradictions necessitate cross-examination to determine the plaintiff's actual stand.

[23] Lee asserts that there are serious disputes of facts between the parties regarding the changes to shareholding and management structure of the company. Lee argues that these disputed facts, including the reasons for the vacancy of director and the justification for the appointment and allotment of shares, need to be investigated through cross-examination.

[24] Lee maintains that allegations of fraud and/or bad faith cannot be inferred merely from affidavit evidence and must instead be investigated

further via cross-examination. Lee's counsel cites legal authorities to support the argument that such issues are inappropriate to be determined via inference from affidavit evidence.

[25] Lee submits that if the cross-examination is not granted, the court will be constrained to ignore the disputed facts and decide the OS based on the remaining undisputed facts, which would not be proper given that these disputed facts go to the core of the issues raised in the OS.

[26] Finally, Lee refutes the allegations of delay in filing the cross-examination application and denies any vexatious intentions. She argues that the application was made in good faith and that there is no risk of dissipation of the company's assets due to existing court orders restraining the disposal of assets.

CJ Polymers' submissions

[27] CJ Polymers also supports Wong's application and submits that there are clearly triable issues concerning the disputed matters pleaded and decided in OS 138, Kerk's conduct, and the misappropriation issue. CJ Polymers argues that these issues cannot be satisfactorily resolved via affidavit evidence alone.

[28] CJ Polymers contends that this is a minority oppression suit and from the various competing affidavits filed by the parties, it is clear that there are various serious and material disputed facts. CJ Polymers asserts that this material set of disputed facts would be more appropriately resolved by the court with and through the benefit of cross-examination.

[29] CJ Polymers argues that this is a fact-sensitive case whereby the veracity of the averments made by the parties in respect of the oppressive acts ought to be determined by the court through full trial. CJ Polymers maintains that the cross-examination of deponents would allow parties to test the veracity of the statements in the affidavit and the documentary exhibits.

[30] CJ Polymers submits that the court has the jurisdiction and power to regulate the proceedings and grant the directions sought for in encl 176. CJ Polymers asserts that the purpose of this application is to ensure that the OS could be conducted and disposed of in a just, expeditious, and economical manner.

[31] CJ Polymers argues that if the plaintiff is denied leave to cross-examine, the court would have to ignore the disputed averments in affidavits, and the plaintiff will run the risk of not being able to prove its case. CJ Polymers

A contends that this approach would not be proper given that these disputed facts go to the core of the issues raised in the OS.

[32] In conclusion, CJ Polymers supports Wong's application and submits that the necessary orders for cross-examination should be permitted to ensure a fair and thorough examination of the disputed facts in this case.

Kerk's submissions

[33] Kerk submits that Wong has failed to satisfy all three conditions outlined in the case of *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638 (CA), which are necessary for granting leave to cross-examine deponents. He argues that these conditions must be satisfied cumulatively, not alternatively.

[34] Kerk contends that Wong has failed to sufficiently identify any relevant disputed facts in his affidavit in support which warrant cross-examination of the deponents. Kerk maintains that there are no substantial conflicts of the truth of the statements made or issues of fact and/or affidavit evidence in the OS which justify a cross-examination.

[35] Kerk argues that the alleged disputed matters raised by Wong are irrelevant to the disposal of the main suit or are no longer live issues as they have been tried and decided in OS 138. He asserts that this court is not the suitable forum to determine issues that have already been raised and disputed in OS 138.

[36] Kerk submits that Wong has failed to specifically state or explain the relevance of the cross-examination regarding the disputed facts to the issues to be decided by the court in respect of encl 1. Kerk maintains that the 'misappropriation issue' should be decided in Suit 786 and is irrelevant to the issues to be decided in the current OS.

[37] Kerk argues that there is sufficient affidavit evidence and contemporaneous documents for the court to decide on the issues in relation to encl 1. He points out that parties have filed a total of 11 affidavits along with 82 exhibits, which he believes is sufficient for the court to deliberate on encl 1 without the need for cross-examination.

[38] Kerk contends that there is an inordinate and inexcusable delay on the part of Wong in filing the application for cross-examination. Kerk argues that this delay suggests that the application is made in bad faith and is clearly not an appropriate case for the court to exercise its discretion in allowing cross-examination.

[39] Finally, Kerk submits that allowing the application for cross-examination would unnecessarily and substantially delay and increase the cost of disposing of encl 1, rather than leading to an expeditious disposal of the case. He urges the court to dismiss Wong's application with costs.

KUA'S SUBMISSIONS

[40] Kua submits that Wong's application for cross-examination is without merit and should be dismissed. He argues that the alleged disputed facts stated by Wong are of no relevance to the core issues surrounding the OS herein.

[41] Kua contends that the two main issues in the OS are the wrongful removal of Kerk as director and the legality of the manner in which Lee and Wong took over CJ Polymers. Kua asserts that both these issues are based on undisputed facts and/or contemporaneous documents before the court.

[42] Kua argues that the purported issue of 'Kerk's conduct' regarding the RM5m deposit is irrelevant to the OS or, at the very least, not essential to the determination of the main issues. He maintains that this does not warrant a cross-examination of the deponents of all affidavits filed in the OS.

[43] Kua submits that the purported 'misappropriation issue' is not relevant to the OS and should be adjudicated in Suit 786 via trial, not by way of cross-examination in this action. Kua points out that the transfer application filed in Suit 786 has yet to be decided, making Wong's application premature on this ground.

[44] Kua contends that there is an undue and inordinate delay in the filing of Wong's application for cross-examination. He highlights that the exchange of affidavits for the OS was completed by 15 December 2023, and the hearing date was fixed as early as 8 March 2024. Kua argues that Wong's application, filed on 6 June 2024, is unjustifiably late.

[45] Finally, Kua submits that Wong's application for cross-examination is an abuse of court process, filed with an ulterior motive to delay the disposal of the OS. He argues that if allowed, it would unnecessarily and substantially delay and increase the cost of disposing of the OS rather than leading to an expeditious and economical disposal of the same.

THE LAW ON CROSS-EXAMINATION OF DEPONENTS

[46] Order 38 r 2(2) of the Rules of Court 2012 provides that in any cause or matter begun by originating summons and on any application made by notice of application, evidence shall be given by affidavit unless the court

otherwise directs. However, the court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit.

[47] The principles governing applications for cross-examination of deponents were set out by the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah v The Co-Operative Central Bank Ltd*. Tengku Baharudin Shah JCA (as he then was) held:

> You can discern from the authorities referred by the parties that three prime considerations would influence the court in the exercise of its discretion to allow or disallow cross-examination on affidavit. Firstly, the truth of the averment in the affidavit must be challenged or the issues of fact identified. Secondly, cross-examination should only be allowed if the disputed fact is relevant to the issue to be decided and must be limited to that issue only. And thirdly, cross-examination would not advance the cause of justice and should be refused if there is sufficient affidavit evidence or contemporaneous documents to enable the court to properly decide without the need of cross-examination.
>
> It is important to take into account all facts when considering an application for cross-examination and if it has little relevance or little weight to the issue which the judge has to decide, then cross-examination should not be permitted.

[48] The Court of Appeal in *Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor and another appeal* [2018] 2 MLJ 322 emphasised that these three conditions must be satisfied cumulatively, not alternatively. Abdul Rahman Sebli JCA (as he then was) stated:

> All three conditions must be satisfied cumulatively and not alternatively: *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Haji Abdul Razak* [2016] 11 MLJ 1, per Abu Bakar Jais J.

[49] The discretion to allow cross-examination lies with the trial judge. In *Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd* [2001] 4 MLJ 56, the Court of Appeal held:

> The grant or the refusal of an application under O 38 r 2(3) of the RHC is very much an exercise of a judge's power of discretion and the question that must be determined is whether Abdul Malek Ahmad J (as he then was) had exercised his discretion judicially.

[50] The High Court in *ISM Sdn Bhd v Queensway Nominees (Tempatan) Sdn Bhd* [2015] MLJU 757; [2016] 2 CLJ 294 noted that in minority oppression cases, which typically involve various conflicting facts or disputed facts, it may be insufficient to rely on affidavit evidence alone. Abu Bakar Jais JC (as he then was) stated:

> The nature of the case on minority oppression as alleged by the plaintiff is one where

it will involve various conflicting facts or disputed facts that will be contended by both parties. These conflicting or disputed facts would mean that it is insufficient merely to rely on affidavits evidence alone to come to the determination whether there is in fact minority oppression exercised on the plaintiff. The disputed facts would only mean that witnesses ought to be called not only to allow for their version of events to be narrated in court but more importantly for this court to make an assessment on the veracity of their oral testimony.

[51] However, the court retains discretion to determine if the statements in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient plausibility to merit further investigation through cross-examination. In exercising its discretion, the court should consider whether the proposed cross-examination is necessary for the fair disposal of the matter or for saving costs.

ANALYSIS AND FINDINGS OF THE COURT

Whether Wong has sufficiently identified relevant disputed facts that warrant cross-examination and are relevant to the core issues in this case

[52] Wong contends that there are multiple disputed facts which cannot be resolved by affidavit evidence alone and must be tested through cross-examination. In his affidavit supporting encl 176, Wong has identified several key areas of dispute, including whether CJ Polymers is a quasi-partnership, Kerk's conduct relating to certain financial matters of the company, and allegations of misappropriation of company funds through a 'Round-Tripping Exercise' involving offshore companies. Wong and Lee alleged that Kerk and Sim caused losses to CJ Polymers through undisclosed related party transactions involving payments made as purported freight and forwarding fees to two offshore companies — Newroads Management Ltd (established in British Virgin Islands) and CJ Polymers PLC (established in Labuan), which were allegedly 100% jointly owned and managed by Kerk and Sim. This alleged round tripping scheme is one of the main issues in Suit 786 filed by CJ Polymers against Kerk and Sim. The allegations of round tripping and misappropriation are disputed by Kerk, who claims the related party transactions were undertaken with Lee's knowledge. Wong argues that these disputes go to the heart of the oppression claim and cannot be resolved without oral testimony.

[53] Lee and CJ Polymers support Wong's position, arguing that these disputed facts are crucial for determining whether oppression has occurred. They emphasised that the allegations of misconduct by Kerk, if proven, would defeat any legitimate expectation to management even if a quasi-partnership existed, citing *Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd* [1995] 5 MLJ 509; [1999] 3 CLJ 26 (HC).

[54] Conversely, Kerk argues that Wong has failed to sufficiently identify any relevant disputed facts warranting cross-examination. He submits that while there may be different positions taken by the parties, there are no substantial conflicts in the truth of the statements made or issues of fact that justify cross-examination. Kerk contends that the core issues of the OS relate solely to his removal as director and the allotment of shares to Wong, which he claims are based on undisputed facts and contemporaneous documents already before the court. He argues that these events, on their face, constitute oppressive conduct regardless of any broader context.

[55] Kua aligns with Kerk's position, contending that the alleged disputed facts are not relevant to the core issues of the OS or, at the very least, not essential to its determination. Kua argues that the court can determine whether oppression has occurred based solely on the undisputed events of Kerk's removal and the share allotment, without delving into the broader allegations of misconduct or the historical nature of the shareholders' relationship. He contends that introducing these additional issues would unnecessarily complicate and prolong the proceedings.

[56] After careful consideration, I find that Wong has adequately identified several material factual disputes that go to the heart of the issues in this case and are indeed relevant to the core issues. The question of whether CJ Polymers is a quasi-partnership is not merely relevant, but fundamental to the entire premise of Kerk's oppression claim. Without establishing the existence of a quasi-partnership, Kerk cannot lay claim to any legitimate expectation to management, and his claim of oppression premised on exclusion from management would fail. He would instead have to accept majority rule, as is typical in standard company structures.

[57] The importance of this issue is underscored by the confused and uncertain contentions made by Kerk in his affidavit evidence. There are glaring inconsistencies in Kerk's position regarding the quasi-partnership status of CJ Polymers:

(a) in the current OS, Kerk claims that CJ Polymers is a quasi-partnership based on findings from OS 138;

(b) however, in OS 138 itself, Kerk affirmed on affidavit that CJ Polymers was not formed as a quasi-partnership;

(c) even after the buy-out order in OS 138, Kerk maintained in his appeal (Appeal 2148) that CJ Polymers was not formed on the basis of a quasi-partnership; and

(d) when confronted with these inconsistencies, Kerk's position remained uncertain:

(i) on 15 December 2023, he indicated he would withdraw Appeal 2148;

(ii) on 24 January 2024, he reversed this position, calling it a 'wrong averment'; and

(iii) finally, on 7 May 2024, he changed position again by issuing a notice of discontinuance to withdraw Appeal 2148.

[58] These repeated changes in position on a critical issue central to the case highlight the necessity for cross-examination. It is crucial for the defendants to be allowed to cross-examine Kerk on his actual stand regarding the existence of a quasi-partnership in CJ Polymers.

[59] The allegations regarding misappropriation of funds and improper conduct by Kerk are also highly relevant to the oppression claim and are vigorously disputed by the parties. Wong has provided specific details of the alleged 'Round-Tripping Exercise' involving Kerk and Sim's privately owned offshore companies, Newroads Management Ltd and CJ Polymers PLC. These allegations, if proven, could significantly impact the assessment of whether there has been oppression or disregard of Kerk's interests as a member.

[60] The Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah v The Co-Operative Central Bank Ltd* held that 'the truth of the averment in the affidavit must be challenged or the issues of fact identified' to justify cross-examination. I find that Wong has met this threshold by pointing to specific factual disputes that are material to the case.

[61] Furthermore, in *Dato' Tan Wei Lian v Datuk Mansor Masikon* [2019] MLJU 1615, the High Court held that 'findings of mala fides or lack of bona fides should not be made via inferences on affidavit evidence alone and that the proper course is for the relevant deponents whose conduct is being impugned, to be cross-examined in respect of the matters deposed on affidavits'. This principle is particularly relevant to the present case, where allegations of misconduct and bad faith are central to the dispute.

[62] The Supreme Court in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 emphasised the importance of oral evidence in resolving factual disputes, stating:

> Unquestionably, these conflicts in the evidence can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined on their evidence which, however, is not possible in proceedings begun by originating summons ... In any case it is most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence.

[63] The comprehensive table presented by Wong linking disputed facts to specific prayers in the OS is particularly persuasive in demonstrating the necessity of cross-examination. The table outlines several key areas of dispute:

(a) the existence of a quasi-partnership: There are contradictory positions taken by the plaintiff in different proceedings. In OS 138, the plaintiff denied the existence of a quasi-partnership, but in the current proceedings, he asserts that CJ Polymers was incorporated as a quasi-partnership. This inconsistency is central to the plaintiff's claim of legitimate expectation to participate in management;

(b) the lawfulness of Wong's appointment as a director: The plaintiff contends this appointment was unlawful, while Wong denies this allegation. This dispute directly relates to the alleged oppressive conduct;

(c) the legality of the share allotment: The plaintiff argues that the share allotment to Wong, making him a 50% shareholder, was unlawful. Lee and Wong contest this, providing different justifications for the allotment;

(d) allegations of misconduct and misappropriation: Wong and CJ Polymers allege that the plaintiff, together with Sim, participated in dubious transactions and misappropriated company funds. These allegations are vigorously denied by the plaintiff; and

(e) the overall conduct of Lee and Wong: The plaintiff claims their actions were oppressive and detrimental to his rights as a shareholder, while the defendants deny these allegations and assert they were acting in the best interests of the company.

[64] These disputed facts are directly linked to the prayers in the OS and go to the heart of determining whether there has been oppression of the plaintiff's rights as a member of the company. The table clearly demonstrates that these are not mere differences of opinion, but substantial factual disputes that require thorough examination through cross-examination as these are factual conflicts that may significantly impact the outcome of the case.

[65] The relevance of these broader issues to oppression claims is well-established in case law. In the House of Lords case of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, Lord Wilberforce emphasised the importance of considering the broader context of shareholders' relationships:

> The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

[66] This principle supports the consideration of the quasi-partnership issue, as it directly relates to the nature of the shareholders' relationship in CJ Polymers. The importance of considering allegations of misconduct in oppression cases was highlighted in *Ngan Tuck Seng v Ngan Yin Groundnut Factory Sdn Bhd*, noting that a director's expectation to remain in management must be accompanied by the reciprocal obligation to act in good faith and not breach fiduciary duties. The court held:

> In my view, Tuck Seng's expectation to remain as a director and to participate in the management and control of the respondent must be circumscribed by a reciprocal explanation that he will himself in the discharge of his duties act in good faith and not do anything that would result in a breach of his fiduciary duties towards the respondent nor conduct himself in such a way that betrays that very trust and confidence which he claims binds members in a partnership company.

[67] In light of these authorities and the nature of the factual disputes identified by Wong, I am satisfied that he has sufficiently identified relevant disputed facts that warrant cross-examination and are indeed relevant to the core issues in this case. While the removal of Kerk as director and the share allotment are important events, the broader context and underlying circumstances are crucial to determining whether these actions constitute oppression. The nature of the shareholders' relationship (ie, whether a quasi-partnership existed) and Kerk's alleged misconduct are directly relevant to assessing the legitimacy of the actions taken by the other shareholders and whether they disregarded Kerk's interests as a member.

[68] These issues cannot be viewed in isolation from the specific events complained of in the OS. They provide the necessary context for understanding the motivations behind the actions taken and for determining whether those actions were oppressive in the circumstances. To consider only the bare facts of Kerk's removal and the share allotment, without examining the broader context, would risk an incomplete and potentially unjust assessment of the oppression claim.

[69] The question of quasi-partnership, the lawfulness of directorial appointments and share allotments, and the allegations of financial impropriety are all crucial elements that require thorough examination. Given the complexity and importance of these issues, I find that they cannot be satisfactorily resolved on affidavit evidence alone. Cross-examination is necessary to fully explore these disputed facts and to allow for a proper assessment of the credibility of the parties' conflicting accounts.

[70] For these reasons, I am satisfied that Wong has sufficiently identified relevant disputed facts that warrant cross-examination and are relevant to the core issues in this case.

Whether Wong has adequately explained how cross-examination is relevant to the issues to be decided in this case

[71] Wong submits that cross-examination is necessary to determine the veracity of the contested facts which form the basis of Kerk's oppression claim. He argues that issues of fraud and bad faith allegations cannot be properly determined without testing the evidence through cross-examination. Wong specifically points to the need to cross-examine Kerk on his seemingly inconsistent positions regarding the quasi-partnership status of CJ Polymers and the alleged 'Round-Tripping Exercise' involving offshore companies. He contends that these issues are fundamental to assessing whether there has been oppression or disregard of Kerk's interests as a member.

[72] Lee and CJ Polymers support Wong's view, emphasising that the complex nature of the allegations requires oral testimony to be properly assessed. They argue that the allegations of misconduct by Kerk, if proven, would significantly impact the assessment of oppression. Lee and CJ Polymers contend that cross-examination is crucial to uncover the true circumstances surrounding Kerk's removal as director and the subsequent allotment of shares to Wong, which form the core of Kerk's oppression claim.

[73] Kerk contends that Wong has failed to specifically explain the relevance of cross-examination to the issues to be decided by the court in respect of the OS. He argues that the alleged disputed facts are irrelevant to the disposal of the main suit. Kerk maintains that the core issues of the OS relate to his removal as director and the share allotment to Wong, which he claims are based on undisputed facts and can be decided without cross-examination. He asserts that the other matters raised by Wong, particularly those relating to OS 138 and Suit 786, are not relevant to the current proceedings.

[74] Kua supports Kerk's position, asserting that the core issues of the OS can be decided based on undisputed facts and documents already before the court. Kua argues that the different contentions raised by Wong are merely different opinions of the parties which can be determined by way of affidavit evidence. He contends that cross-examination would not advance the cause of justice in this case and would only lead to unnecessary delay.

[75] I am satisfied that Wong has adequately demonstrated the relevance of cross-examination to the key issues in this case. The question of whether CJ Polymers is a quasi-partnership is central to Kerk's claim of legitimate expectation and oppression. Cross-examination may shed light on the true nature of the shareholders' relationship and expectations, particularly given Kerk's seemingly inconsistent positions on this issue in different proceedings.

[76] The importance of determining the existence of a quasi-partnership in oppression cases was emphasised in *Ebrahimi v Westbourne Galleries Ltd* where Lord Wilberforce stated:

> The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

[77] Cross-examination on this issue would allow the court to better assess whether such 'rights, expectations and obligations' existed between the shareholders of CJ Polymers.

[78] The relevance of cross-examination on the quasi-partnership issue is further supported by Malaysian case law. In *Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors* [2006] 4 MLJ 421, Ramly Ali J (as he then was) outlined the elements of a quasi-partnership:

> [32] The court is of the view that it is not sufficient for the petitioners to allege a mere intention in order to discharge their evidential burden. The petitioners have the burden to prove the followings:
>
> (1) that the first respondent company is an 'Ebrahimi' type of company or a quasi-partnership company;
>
> (2) that there is in existence a specific identifiable legitimate expectation that the petitioners are entitled to the alleged sharing of management control; and
>
> (3) that there has been a breach of this agreement or understanding relating to this legitimate expectation which according to established principles of equity, the court finds it just and equitable to restrain.

[79] This underscores the complexity of establishing a quasi-partnership and supports Wong's argument that thorough examination through cross-examination is necessary to determine whether these elements are present in CJ Polymers.

[80] Moreover, in *Seah Eng Toh Daniel v Kingsley Khoo Hoi Leng & 3 Ors* [2015] MLJU 2353, the High Court emphasised that determining quasi-partnership status is primarily a question of fact:

A [20] Therefore, whether a company may be characterised as a 'quasi-partnership' company is primarily a question of fact so as to attract the application of the judicial concept.

B **[81]** This principle strongly supports the need for cross-examination on this issue, as questions of fact are best resolved through oral testimony where witnesses can be questioned directly on their understanding and expectations regarding the company's nature.

C **[82]** Similarly, the allegations of misconduct and misappropriation by Kerk are directly relevant to whether there has been oppression or disregard of his interests as a member. As held in *Ngan Tuck Seng v Ngan Yin Groundnut Factory Sdn Bhd*, the expectation to remain as a director and participate in the management and control of the respondent is circumscribed by the
D requirement that he acts in good faith, does not breach his fiduciary duties, and does not betray the trust and confidence binding members in a partnership company.

E **[83]** This principle underscores the relevance of the alleged misconduct to the oppression claim. If proven, such misconduct could defeat any legitimate expectation to management even if a quasi-partnership existed.

[84] Furthermore, in *Dato' Tan Wei Lian v Datuk Mansor Masikon*, the High
F Court emphasised the importance of cross-examination in cases involving allegations of bad faith:

> In my view, the reasoning of Lord Greene MR in *Re Smith & Fawcett Ltd* [1942] Ch 304; [1942] 1 All ER 542 (CA) is very relevant in the present context. He said that generally findings of mala fides or lack of bona fides should not be made via
G inferences on affidavit evidence alone and that the proper course is for the relevant deponents whose conduct is being impugned, to be cross-examined in respect of the matters deposed on affidavits.

[85] Furthermore, the relevance of examining allegations of misconduct
H through cross-examination is supported by *Tan Hock Beng v Perfect Kamhung Sdn Bhd* [2009] 6 MLJ 92, where the High Court held:

> The fact that such a fund (by whatever name it is called) existed for the purpose as described by the petitioner is not in doubt. But a director in a quasi partnership takes on a fiduciary relationship inter se with the other directors to act with utmost
I good faith in the management of the company. The conduct of the petitioner in the context of quasi partnership is under the circumstances unacceptable ... The respondents acting through their directors were perfectly justified to convene the EGM to remove the petitioner.

[86] This case demonstrates that misconduct can justify the removal of a director even in a quasi-partnership context. Therefore, cross-examination on the alleged misconduct by Kerk is crucial to determining whether his removal was oppressive or a legitimate response to his actions.

[87] Given the serious allegations of misconduct and bad faith in this case, cross-examination is particularly relevant and necessary to properly assess these claims.

[88] The credibility of Kerk is a significant issue in this case. In OS 138, Justice Ong Chee Kwan found that Kerk's sworn statements were untrue during cross-examination. This pattern of behavior justifies the need for cross-examination in the current case to test the veracity of the plaintiff's statements. It is crucial to ensure that the court has accurate and reliable information on which to base its decision.

[89] The relevance of cross-examination in minority oppression cases was also recognised in *ISM Sdn Bhd v Queensway Nominees (Tempatan) Sdn Bhd*, where the High Court noted:

> The nature of the case on minority oppression as alleged by the plaintiff is one where it will involve various conflicting facts or disputed facts that will be contended by both parties... These conflicting or disputed facts would mean that it is insufficient merely to rely on affidavits evidence alone to come to the determination whether there is in fact minority oppression exercised on the plaintiff. The disputed facts would only mean that witnesses ought to be called not only to allow for their version of events to be narrated in court but more importantly for this court to make an assessment on the veracity of their oral testimony. There is nothing better than this court being able to have the opportunity to look at the demeanour of the witnesses before judging the truth of what had been testified in open court.

[90] Furthermore, there is a precedent for cross-examination in related proceedings. In OS138, which involved many of the same parties and related issues, cross-examination was allowed and all parties, including Kerk, were cross-examined. This precedent is particularly relevant to the current case.

[91] These authorities collectively reinforce the necessity of cross-examination to properly assess both the quasi-partnership status of CJ Polymers and the allegations of misconduct against Kerk. These issues are inextricably linked to the determination of whether there has been oppression, and cannot be adequately resolved through affidavit evidence alone.

[92] In light of these authorities and the complex factual matrix of this case, I find that Wong has adequately explained how cross-examination is relevant to the issues to be decided. The disputed facts identified go to the heart of the

oppression claim and cannot be satisfactorily resolved on affidavit evidence alone. Cross-examination will provide a crucial opportunity to test the evidence and assess the credibility of the witnesses on these key issues, thereby assisting the court in making a fair and informed decision on the oppression claim.

Whether the existing affidavit evidence (11 affidavits with 82 exhibits) is sufficient for the court to decide the case without cross-examination

[93] Kerk submits that the 11 affidavits with 82 exhibits filed by the parties provide sufficient evidence and contemporaneous documents for the court to decide the OS without the need for cross-examination. He argues that these affidavits comprehensively address all relevant issues, including the circumstances surrounding his removal as director and the share allotment to Wong. Kerk relies on *Kumugai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 (HC) to argue that abundant documentary evidence enables the court to arrive at a decision without cross-examination. He contends that the court can determine the existence of oppression based on the undisputed facts and documents already before it.

[94] Kua supports Kerk's view, arguing that the core issues of the OS can be determined based on the existing evidence. He contends that the affidavits filed provide a clear picture of the events leading to Kerk's removal and the subsequent share allotment. Kua emphasises that these key events are not in dispute and that the court can assess their propriety based on the documentary evidence provided, without the need for oral testimony.

[95] Wong contends that the factual disputes cannot be satisfactorily resolved via affidavit evidence alone. He argues that the affidavits present conflicting accounts of crucial matters, including the nature of the shareholders' relationship and Kerk's alleged misconduct. Wong emphasises that these disputes involve questions of intent, knowledge, and conduct that cannot be properly assessed without cross-examination. He cites *Ting Ling Kiew v Tang Eng Iron Works Co Ltd* to support his position that it is inappropriate to decide disputed facts summarily by relying simply on affidavit evidence.

[96] Lee aligns with Wong's position, arguing that the complex nature of the allegations, particularly those involving fraud and bad faith, necessitate oral testimony. She contends that the affidavits alone cannot provide a complete picture of the circumstances surrounding the alleged 'Round-Tripping Exercise' and Kerk's attempts to alter the company's financial records. Lee asserts that cross-examination is essential to test the veracity of these serious allegations.

[97] CJ Polymers supports the arguments of Wong and Lee, emphasising that the oppression claim requires a thorough examination of the company's affairs and the conduct of its members. CJ Polymers argues that while the affidavits provide a foundation, they are insufficient to fully explore the nuances of the shareholders' relationship and the impact of the alleged misconduct on the company's operations.

[98] While I acknowledge the substantial volume of affidavit evidence before the court, I am not convinced that it is sufficient to resolve the key factual disputes without cross-examination. The issues in contention involve complex questions of intent, knowledge, and conduct that are not easily determined from documents alone.

[99] In *Ting Ling Kiew v Tang Eng Iron Works Co Ltd*, the Supreme Court emphasised the limitations of deciding disputed facts based solely on affidavit evidence, stating that conflicts can only be properly resolved through oral evidence and cross-examination, which is not possible in proceedings begun by originating summons.

[100] This principle is particularly relevant in the present case, where there are significant disputes regarding the nature of the shareholders' relationship and allegations of misconduct.

[101] The importance of oral evidence in minority oppression cases was highlighted in *ISM Sdn Bhd v Queensway Nominees (Tempatan) Sdn Bhd*, where the court observed that conflicting or disputed facts necessitate calling witnesses for oral testimony to assess the veracity and demeanor of the witnesses.

[102] This reasoning is persuasive and applicable to the present case. The allegations of oppression and misconduct raised here are complex and multifaceted, involving issues that go beyond what can be adequately captured in affidavits alone.

[103] The recent High Court decision in *Datuk Kasi a/l KL Palaniappan v Menara Embun Sdn Bhd & Ors and another case* [2023] MLJU 2412 further reinforces the necessity of cross-examination in complex minority oppression cases. In that case, Liza Chan Sow Keng J held:

> [25] I am of the firm view that anyhow once slices it, there are disputes of facts in the affidavits relating to the understanding, the new board understanding, the breaches of these understandings and the resolutions being passed in Menara Embun and Menara Eden purportedly without DK's knowledge, consent and/or approval so as to facilitate the said breaches. All the defendants have denied the existence of the said understandings and the alleged breaches thereof. In my respectful view, the

A controversy of facts pertaining to the truth of the allegations of fact of the alleged understandings and breaches can only be resolved by viva voce evidence. It would be critical to ascertain the true state of affairs by resort to cross-examination. It is insufficient merely to rely on affidavits evidence alone to make a definitive determination whether there is in fact minority oppression inflicted on DK in B respect of the conduct of affairs of the two companies.

[104] This reasoning is directly applicable to the present case. The disputed facts here, particularly regarding the quasi-partnership status, alleged misconduct, and the circumstances surrounding Kerk's removal and the share C allotment, are analogous to the 'understandings' and 'breaches' discussed in *Datuk Kasi*. The court's emphasis on the insufficiency of affidavit evidence alone to make a definitive determination on minority oppression claims strongly supports the need for cross-examination in the current case.

D **[105]** In *Dato' Tan Wei Lian v Datuk Mansor Masikon*, the High Court emphasised the importance of cross-examination in cases involving allegations of bad faith, stating that findings of mala fides should not be made based solely on affidavit evidence and that cross-examination of the deponents is necessary.

E **[106]** Given the serious allegations of misconduct and bad faith in this case, particularly regarding the alleged 'Round-Tripping Exercise' and attempts to alter financial records, cross-examination is necessary to properly assess these claims.

F **[107]** While the case of *Kumugai Gumi Co Ltd v Zenecon-Kumugai Sdn Bhd & Ors and another application*, cited by Kerk, suggests that abundant documentary evidence may sometimes be sufficient, it is distinguishable from the present case. Here, the key disputes involve not just the existence of certain G events or transactions, but their underlying nature, intent, and impact on the company and its members. These are matters that require a more nuanced examination than can be achieved through affidavit evidence alone.

H **[108]** In conclusion, while the 11 affidavits with 82 exhibits provide a substantial evidentiary foundation, they are not sufficient to resolve the key factual disputes in this case. The complex nature of the allegations, the conflicting accounts of crucial events, and the need to assess the credibility of the parties on central issues all point to the necessity of cross-examination. This will enable the court to make a more informed and just determination of the I oppression claim, based not only on documentary evidence but also on the demeanour and credibility of the witnesses when subjected to questioning on their evidence.

Whether the alleged disputed facts relating to other court cases (OS 138 and Suit

786) are relevant to the current proceedings

[109] Kerk argues that matters related to OS 138 and Suit 786 should not be considered in the current proceedings as they involve different causes of action, parties, and issues. He contends that this court is not the appropriate forum to determine issues raised in other cases. Kerk emphasises that OS 138 has already been decided, resulting in a buy-out order, and that the findings therein should not be re-litigated in the current proceedings. As for Suit 786, Kerk asserts that it deals with separate allegations of misconduct which are not pertinent to the oppression claim in the current OS. He cites the principle of res judicata and argues that allowing these matters to be considered would lead to a multiplicity of proceedings.

[110] Kua supports Kerk's position, emphasising that the issues in Suit 786 should be adjudicated in that proceeding and not through cross-examination in this case. He contends that the allegations of misconduct in Suit 786 are distinct from the oppression claim and that considering them here would prejudice the fair trial of that separate action. Kua argues that the court should focus solely on the events directly related to Kerk's removal as director and the subsequent share allotment, without being influenced by extraneous matters from other proceedings.

[111] Wong submits that the findings in OS 138 regarding the quasi-partnership are highly relevant to the current case, as they form the basis for Kerk's claim of legitimate expectation. He points out that Kerk himself relies on the finding of quasi-partnership from OS 138 to support his oppression claim in the current proceedings. Wong argues that this creates an issue estoppel that prevents Kerk from denying the quasi-partnership status. Regarding Suit 786, Wong contends that the allegations of misconduct, particularly the 'Round-Tripping Exercise,' are directly relevant to assessing whether the actions taken against Kerk were justified or oppressive.

[112] Lee aligns with Wong's position, arguing that the issues in OS 138 and Suit 786 are inextricably linked to the current oppression claim. She emphasises that the court cannot properly assess whether oppression has occurred without considering the full context of the parties' relationship and conduct. Lee contends that the allegations in Suit 786, if proven, would demonstrate that Kerk's removal as director was a justified response to his misconduct rather than an oppressive act.

[113] CJ Polymers supports the arguments of Wong and Lee, asserting that the findings and issues from OS 138 and Suit 786 are crucial to understanding the true nature of the dispute. CJ Polymers argues that excluding this context would result in an incomplete and potentially unjust assessment of the

oppression claim. CJ Polymers contends that the court has the discretion to consider relevant evidence from related proceedings to ensure a fair determination of the issues before it.

[114] I am of the view that while OS 138 and Suit 786 are distinct proceedings, certain findings and issues raised therein are indeed relevant to the current case. The determination of whether CJ Polymers is a quasi-partnership in OS 138 is directly relevant to Kerk's claim of legitimate expectation in this case. Similarly, the allegations of misconduct in Suit 786, if proven, could significantly impact the assessment of whether there has been oppression.

[115] While the findings in OS 138 are relevant, it is crucial to recognise that the current situation may have evolved since the buy-out order. The dismissal of the transfer application does not necessarily mean that all issues are entirely separate and unrelated. It is imperative to examine the current state of affairs within the company, rather than relying solely on past judgments. This approach ensures that the court's assessment is based on the most up-to-date circumstances of the company and its shareholders.

[116] The relevance of findings from related proceedings in oppression cases is supported by case law. In *Ebrahimi v Westbourne Galleries Ltd*, Lord Wilberforce emphasised the importance of considering the broader context of shareholders' relationships, stating that the words 'just and equitable' recognise that a limited company is more than a mere legal entity and that there are individuals with rights, expectations, and obligations inter se which are not necessarily submerged in the company structure.

[117] This principle supports the consideration of the quasi-partnership finding from OS 138, as it directly relates to the nature of the shareholders' relationship in CJ Polymers.

[118] In *Ngan Tuck Seng v Ngan Yin Groundnut Factory Sdn Bhd*, the relevance of considering alleged misconduct in oppression cases was highlighted, noting that a director's expectation to remain in management must be accompanied by the reciprocal obligation to act in good faith and not breach fiduciary duties.

[119] This supports the relevance of the allegations in Suit 786 to the current oppression claim, as they bear directly on whether Kerk's conduct may have justified the actions taken against him.

[120] In *Datuk Kasi a/l KL Palaniappan v Menara Embun Sdn Bhd & Ors and another case*, the importance of considering all relevant circumstances in oppression cases was emphasised, with the court holding that the controversy of facts regarding alleged understandings and breaches requires viva voce

evidence and cross-examination, rather than solely relying on affidavits.

[121] This underscores the broad discretion of the court to consider all relevant circumstances, which may include matters raised in related proceedings.

[122] The court must take a holistic view of the dispute, considering not only the specific events of Kerk's removal as director and the subsequent share allotment but also the broader context of the parties' relationship and conduct. This includes examining any alleged misconduct or breaches of fiduciary duty that may have led to these actions. Such a comprehensive approach is necessary to properly assess whether oppression has occurred.

[123] While this court will not adjudicate on matters properly before other courts, it cannot ignore relevant factual findings or allegations that bear on the issues in this case. The principle of comity between courts does not preclude consideration of relevant findings or issues from related proceedings, particularly when they are integral to understanding the full context of the dispute before the court.

[124] Furthermore, the court has the discretion to consider relevant evidence from related proceedings to ensure a fair determination of the issues before it. This discretion is particularly important in complex cases involving multiple related disputes and proceedings. Excluding such context could result in an incomplete and potentially unjust assessment of the oppression claim.

[125] Cross-examination on these issues may help clarify the relevance and impact of the related proceedings on the current dispute. It will allow the court to assess the weight to be given to findings from OS 138 and allegations in Suit 786, without necessarily re-litigating those matters in full.

[126] In conclusion, while the court must be cautious not to encroach on matters properly before other courts, the findings from OS 138 regarding the quasi-partnership status and the allegations of misconduct in Suit 786 are sufficiently relevant to the current oppression claim to warrant consideration. The court must strike a balance between avoiding the re-litigation of decided matters and ensuring that all relevant information is considered in the current proceedings. This approach allows for a nuanced and contextual understanding of the dispute, which is essential in oppression cases where the relationship between parties and the overall conduct of the company's affairs are central to the determination of the claim. Cross-examination on these issues will assist the court in determining their proper weight and relevance to the oppression claim, ensuring a comprehensive and just assessment of the dispute before it.

Whether there was inordinate delay in filing the application for cross-examination, given that the proceedings are nearing conclusion

[127] Kerk submits that there has been inordinate and inexcusable delay by Wong in filing the application for cross-examination. He argues that any dispute of facts should have been identified at an earlier stage and that the application should have been filed sooner. Kerk points out that the OS was filed on 5 October 2023, and the main exchange of affidavits was completed by 15 December 2023. He contends that Wong had ample time to identify any need for cross-examination during this period. Kerk cites *Dato' Dr Henry Ooi Kwee Lim v Majlis Perubatan Malaysia* [2012] 1 MLJ 549 (HC), where the court held that delay in filing an application to cross-examine could defeat the right to cross-examine.

[128] Kua supports Kerk's position, pointing out that the application was filed more than three months after the disposal of earlier applications (encls 13 and 68) on 4 March 2024 and just one day before the hearing of other pending applications (encls 18, 22, 42 and 44). He argues that this timing suggests an attempt to delay proceedings rather than a genuine need for cross-examination. Kua emphasises that the hearing date for the OS was fixed on 8 March 2024 for 31 July 2024, giving ample notice of the progression of the case.

[129] Wong contends that there is no delay in filing the application because at the time it was filed on 6 June 2024, the exchange of affidavits for the OS had not yet been exhausted. He points out that additional affidavits were filed after his application, with the plaintiff's final affidavit due on 8 July 2024. Wong argues that the need for cross-examination became apparent only after reviewing the full set of affidavits and identifying key factual disputes. He cites *Charles Koo Ho-Tung v Koo Lin Shen* [2015] MLJU 910; [2016] 2 CLJ 267 (HC), where the court held that an application to cross-examine must be made in good faith and not for an improper purpose.

[130] Lee supports Wong's position, arguing that the application was timely given the ongoing exchange of affidavits. She contends that the complexity of the issues and the volume of evidence necessitated careful consideration before determining the need for cross-examination. Lee emphasises that no directions for written submissions had been given at the time of the application, indicating that the proceedings were not yet at a concluding stage.

[131] CJ Polymers aligns with Wong and Lee, asserting that the application was made at an appropriate juncture in the proceedings. CJ Polymers argues that the nature of oppression claims often requires a comprehensive review of

all evidence before the need for cross-examination becomes apparent. CJ Polymers contends that the application was made promptly once the necessity for oral evidence was identified.

[132] I do not find that there has been inordinate delay in filing this application. The application was made before the exchange of affidavits was complete and before any directions were given for the filing of written submissions. This is unlike the situation in *Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd*, where the application was made on the day of the hearing of the winding-up petition. In the present case, the affidavit exchange is still ongoing when the application was filed. This was also a case decided before the inception of O 1A as compared to the present, where the courts would look at the justice of the case instead of only ascribing to technical features.

[133] The ongoing nature of the affidavit exchange is evident from the recent filing of encl 174 by Kerk on 6 June 2024, followed by the court granting liberty to Lee, Wong and CJ Polymer to file replies. The subsequent filing of voluminous affidavits in response further demonstrates that the exchange of affidavits was still in progress at the time the cross-examination application was made. This recent flurry of activity indicates that the application was timely and responsive to ongoing developments in the case.

[134] Moreover, no written submission directions had been given for the main OS hearing at the time of filing the application, which further supports the view that the proceedings were not at a concluding stage. The court must focus on the justice of the case rather than technical delays, emphasising the importance of thoroughly examining the disputed facts over strict adherence to timelines.

[135] The question of delay in applications for cross-examination must be considered in the context of the specific proceedings. This principle underscores the need to consider the specific circumstances of each case when assessing the timeliness of an application for cross-examination.

[136] In the present case, several factors weigh against finding inordinate delay:

(a) ongoing exchange of affidavits: At the time of Wong's application, the affidavit process was not yet complete. The Supreme Court in *Ting Ling Kiew v Tang Eng Iron Works Co Ltd* recognised the importance of having a full picture before determining the need for cross-examination:

> Apart from the various inconsistencies in the affidavits of the appellants and the respondents in the court below, we also observe other matters which have

A not been satisfactorily explained in the affidavits and could be resolved if the proceedings have been begun by writ ...

This suggests that it may be appropriate to wait until all affidavits are filed before seeking cross-examination;

B

(b) complexity of the case: Oppression cases often involve complex factual matrices. This complexity may justify a more extended period for parties to assess the need for cross-examination; and

C (c) no prejudice to proceedings: The application was made before any directions for written submissions and in advance of the hearing date. In *Charles Koo Ho-tung & Ors v Koo Lin Shen & Ors*, the High Court held:

> If there is a conflict in affidavit evidence and there is no cross-examination of Lee, the plaintiffs run the risk of not discharging the legal burden to prove the OS under ss 101(1) and 102 EA.

D

This emphasises the importance of allowing cross-examination when there are genuine factual disputes, even if the application is made at a later stage of proceedings.

E

[137] While the court in *Dato' Dr Henry Ooi Kwee Lim v Majlis Perubatan Malaysia* did consider delay as a factor in refusing cross-examination, that case involved a delay of 13 months with no explanation offered. The present case is distinguishable, as the application was made within a reasonable timeframe F given the ongoing exchange of affidavits and the complexity of the issues involved.

[138] In conclusion, while the application for cross-examination was not made immediately after the initial exchange of affidavits, I do not find that G there has been inordinate delay in the circumstances of this case. The application was made at a stage where the full scope of factual disputes had become apparent, but before the proceedings had reached a concluding phase. The interests of justice and the need for a full exploration of the issues in this complex oppression claim outweigh any concerns about the timing of the H application.

Whether allowing cross-examination at this stage would unnecessarily delay the disposal of the case

I **[139]** Kerk argues that allowing cross-examination at this stage would unnecessarily delay the full and final disposal of the OS. He points out that the OS was filed on 5 October 2023 and has been ongoing for nearly nine months. Kerk contends that introducing cross-examination now would significantly prolong the proceedings, potentially pushing the resolution well into 2025. He

cites *Wong Kie Chie v The Personal Representative Of The Estate Of Wong Kie Nai (deceased) & Ors* [2015] MLJU 359, where the High Court held that 'a cross-examination of all the deponents of all the affidavits filed in the said actions would unnecessarily and substantially delay and increase the cost of disposing the said actions rather than leading to an expeditious and economical disposal'. Kerk emphasises that the delay would prejudice his rights and allow the alleged oppressive conduct to continue unchecked.

[140] Kerk further contends that any benefits of cross-examination are outweighed by the potential delay and increased costs. He argues that the case can be fairly decided on the existing evidence, which includes 11 affidavits and 82 exhibits. Kerk emphasises that the key events — his removal as director and the share allotment to Wong — are undisputed, and their propriety can be assessed based on the documents already before the court. He cites *Kumugai Gumi Co Ltd v Zenecon-Kumugai Sdn Bhd & Ors and another application*, where the court held that cross-examination would not advance the cause of justice and the matter could be decided without it due to the abundant undisputed documentary evidence.

[141] Kua aligns with Kerk's view, emphasising that cross-examination would lead to an unjust delay in the proceedings. He argues that the court has sufficient evidence in the form of 11 affidavits with 82 exhibits to make a determination on the OS. Kua contends that the delay caused by cross-examination would be disproportionate to any potential benefit, especially given that the core issues of the OS relate to undisputed corporate actions. He cites *Kumugai Gumi Co Ltd v Zenecon-Kumugai Sdn Bhd & Ors and another application*, where the court held that cross-examination should be refused if there is sufficient affidavit evidence to enable the court to properly decide without it.

[142] Kua further asserts that cross-examination would not advance the cause of justice in this case. He argues that the core issues of the OS relate to clear corporate actions that can be assessed objectively without the need for oral testimony. Kua contends that introducing cross-examination at this stage would unnecessarily complicate and prolong the proceedings, potentially prejudicing the rights of the parties.

[143] Wong submits that any potential delay is justified given the importance of resolving the factual disputes to achieve a just outcome in the case. He argues that the complexity of the issues, particularly those relating to the alleged 'Round-Tripping Exercise' and attempts to alter financial records, necessitates oral testimony. Wong contends that without cross-examination, the court would be unable to properly assess the credibility of the parties on these crucial issues. He cites *ISM Sdn Bhd v Queensway Nominees (Tempatan) Sdn Bhd*,

where the court emphasised the importance of oral testimony in minority oppression cases to allow for 'assessment on the veracity of their oral testimony'.

[144] Wong further submits that the benefits of cross-examination in resolving key factual disputes and achieving a just outcome far outweigh any potential delay. He argues that the allegations of misconduct, particularly the 'Round-Tripping Exercise' and attempts to alter financial records, are central to the oppression claim and cannot be properly assessed without oral testimony.

[145] Lee supports Wong's position, arguing that the benefit of cross-examination in achieving a just resolution far outweighs any potential delay. She contends that the allegations of misconduct against Kerk are central to determining whether the actions complained of were oppressive, and these allegations cannot be properly tested without cross-examination. Lee cites *Dato' Tan Wei Lian v Datuk Mansor Masikon*, where the court held that 'findings of mala fides or lack of bona fides should not be made via inferences on affidavit evidence alone and that the proper course is for the relevant deponents whose conduct is being impugned, to be cross-examined'.

[146] CJ Polymers aligns with Wong and Lee, asserting that cross-examination is crucial for a fair determination of the oppression claim. CJ Polymers argues that the factual disputes identified go to the heart of the case and cannot be resolved solely on affidavit evidence. CJ Polymers contends that any delay caused by cross-examination would be in the interests of justice and necessary for the proper adjudication of the dispute.

[147] While I acknowledge that allowing cross-examination may cause some delay in the proceedings, I do not believe this delay would be unnecessary or disproportionate. Given the complexity of the issues and the significance of the factual disputes, I am persuaded that the benefits of cross-examination in achieving a just resolution of the case outweigh the potential delay and any negative impacts it might cause.

[148] The importance of cross-examination in cases involving serious allegations and factual disputes is well-established in case law. In *Ting Ling Kiew v Tang Eng Iron Works Co Ltd*, the Supreme Court emphasised that conflicts in evidence can only be properly resolved through oral evidence and cross-examination, and it is inappropriate to decide disputed facts summarily based solely on affidavit evidence.

[149] This principle is particularly relevant in the present case, where there are significant disputes regarding the nature of the shareholders' relationship and allegations of misconduct.

[150] Furthermore, in *Ebrahimi v Westbourne Galleries Ltd*, Lord Wilberforce highlighted the need for a comprehensive examination of the circumstances in oppression cases, recognising that a limited company is more than a mere legal entity and involves individuals with rights, expectations, and obligations. A

[151] This underscores the importance of allowing cross-examination to fully explore the nuances of the shareholders' relationship and the context of the alleged oppressive acts. B

[152] While the delay caused by cross-examination is a valid concern, it must be balanced against the need for a just and thorough resolution of the case. As noted in *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189 (FC): C

> It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit much be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings. D

[153] In the present case, I do not find any improper motive behind the application for cross-examination. The factual disputes identified are genuine and central to the oppression claim. E

[154] I also find that arguments about potential financial benefits to the defendants as a motive for delay are not relevant to the question of whether cross-examination should be allowed. Salaries and bonuses are based on work done and company performance, and do not bear on the necessity of cross-examination to resolve factual disputes. The key issue at hand is whether there are disputed facts that require investigation through cross-examination, not the current earnings of the defendants. F G

[155] Moreover, the potential for delay must be weighed against the risk of injustice if cross-examination is not allowed. In *Charles Koo Ho-tung & Ors v Koo Lin Shen & Ors*, the High Court noted that if there is a conflict in affidavit evidence and no cross-examination of a particular witness, the plaintiffs risk not discharging the legal burden to prove the originating summons under ss 101(1) and 102 of the Evidence Act. H

[156] This risk of failing to properly adjudicate the dispute due to lack of cross-examination is a significant factor that outweighs concerns about delay. I

[157] Furthermore, it is pertinent to consider the timeline of this case in comparison to similar proceedings. OS 138, which involved many of the same parties and related issues, took two and a half years from filing to decision,

including time for cross-examination and written submissions. In contrast, the current case is only in its ninth month since filing. This comparison suggests that allowing cross-examination would not cause undue delay in the proceedings, especially when considered in the context of similar cases.

[158] The nature of the allegations in this case, particularly those involving bad faith and misconduct, necessitates a thorough examination through cross-examination. As emphasised in *Dato' Tan Wei Lian v Datuk Mansor Masikon*, findings of mala fides or lack of bona fides should not be made based solely on affidavit evidence, and the proper course is for the relevant deponents to be cross-examined. This principle is particularly relevant to the present case, where allegations of misconduct and improper motives are central to the dispute.

[159] The complexity of oppression cases and the need to consider all relevant circumstances support the use of cross-examination. This underscores the need for a comprehensive examination of the relationships and expectations between shareholders, which is best achieved through cross-examination.

[160] The importance of assessing witness credibility in oppression cases cannot be overstated. This principle highlights the limitations of relying solely on affidavit evidence in cases with significant factual disputes.

[161] In conclusion, while allowing cross-examination will inevitably cause some delay in the proceedings, I find that this delay is neither unnecessary nor disproportionate given the circumstances of this case. The complexity of the issues, the seriousness of the allegations, and the central importance of the disputed facts to the oppression claim all justify the additional time that cross-examination will require. The opportunity to test the evidence through cross-examination will significantly aid the court in making a fair and informed decision on the complex issues raised in this oppression claim. The factual disputes identified go to the heart of the case and involve allegations of bad faith and misconduct that cannot be adequately resolved through affidavit evidence alone. The potential for cross-examination to assist in achieving a just and properly informed resolution of the dispute outweighs the concerns about delay. Therefore, I find that the benefits of allowing cross-examination outweigh the potential negative impacts of delay in this case, and I do not consider that allowing cross-examination at this stage would unnecessarily delay the disposal of the case.

CONCLUSION

[162] For the reasons outlined above, I am satisfied that Wong has met the criteria for allowing cross-examination as set out in *Tetuan Kumar Jaspal Quah*

& Aishah v The Co-Operative Central Bank Ltd. He has identified relevant disputed facts, demonstrated the relevance of cross-examination to the issues to be decided, and shown that the existing affidavit evidence is insufficient to resolve these disputes. The application was not filed with undue delay, and the benefits of cross-examination outweigh any potential delay in the proceedings.

[163] Accordingly, the application in encl 176 is allowed with costs in the cause. The parties shall have liberty to cross-examine the deponents of the affidavits filed in relation to the OS.

Enclosure 176 is allowed with costs in the cause.

Reported by Dzulqarnain Ab Fatar